No. 14766

IN THE

United States Court of Appeals

For the Ninth Circuit

MARTHA M. KIRK, an adult, and KENNETH WILLIAM KIRK, a minor, who sues by his Guardian Ad Litem, Martha M. Kirk,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the District of Idaho

SHERMAN F. FUREY, JR.
United States Attorney

By

JOHN T. HAWLEY,
Assistant United States Attorney

Filed..., 1955

....Clerk

FILED

OCT 10 1955

PAUL P. O'BRIEN, CLER

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STATEMENT OF THE CASE

The appellee, United States of America, defendant in the proceedings below shall be referred to as the "Government."

Jurisdiction of the Court is admitted and properly shown in appellants' Brief.

In the proceedings below, the Court granted a motion made by the Government for a Summary Judgment based upon the pleadings on file at the time

the motion was made. As stated by appellants, this appeal is taken from the Order denying the Motion for Leave to Amend Plaintiffs' Complaint, which motion was made after the Court's Opinion granting the Summary Judgment was entered of record, and from the entry of Summary Judgment itself.

Because of the manner of presentation of appellants' Statement of Facts in their Brief, we will briefly outline in chronological order the pleadings filed and the pertinent portions of those pleadings applicable to this appeal.

On February 23, 1954, a Complaint was filed by appellants in the United States District Court, Southern Division, Boise, Idaho, seeking damages from the Government for the wrongful death of one William M. Kirk. Among other things, the Complaint alleges, in part, as follows:

1. Paragraph III:

"That the defendant, United States of America . . ., *was engaged in the construction of a dam under the Lucky Peak Dam Project on the Boise River. . . .*" (R. 5)

2. Paragraph V:

"That the deceased, William M. Kirk, was employed as a carpenter upon the Lucky Peak Dam Project by Bruce Construction Co., and Russ Mitchell, Inc., *which said parties were contractors performing work . . . for the defendant, and under contract to said defendant*;" (R. 5)

3. Paragraph VII:

"That said Lucky Peak Dam, the control works, and the land occupied thereby *were in the possession of and under the control, dominion and authority of the said defendant, the United States of America.*" (R. 6)

4. Paragraph VIII:

"; . . . That Major Grahm Emore, USA, acting within the scope of his employment with defendant, was present *and supervising the work; . . .*" (R. 7)

5. Paragraph IX:

" . . . That thereunder the defendant *exercised complete dominion, control and authority over the premises of the Lucky Peak Dam*, and having through the Department of Army, Corps of Engineers, prepared the design, specifications and plans of said Lucky Peak Dam, *was engaged within the scope of said authority in the detailed supervision of the construction of said dam through its employees in the Lucky Peak Dam Project;*—These employees of the Government, *engaged in the supervision of the construction of the dam*, and within the scope of their employment carelessly, heedlessly and negligently by act and omission failed to perform their duties under the statutes and regulations of the United States, and carelessly, heedlessly and negligently by act and omission failed to provide a reasonably safe place for said

William M. Kirk to work, thereby causing the injury and death of said William M. Kirk." (R. 8)

Interrogatories and Admissions were filed by the appellants of the Government on May 6, 1954. (R 13, 14, 15, 16, 17, 18) The Answer and Response of the Government were filed on June 30, 1954. (R 28, 29, 30, 31, 32, 33, 34) The Government in its response to appellants' Request for Admissions denied that the United States of America was exercising complete dominion, control and authority over the premises of Lucky Peak Dam on May 10, 1953, the date of the accident, and denied that the Government, through its employees and officers, was engaged within the scope of its authority in the detailed supervision of the construction of Lucky Peak Dam.

Answering Interrogatories one and two (R. 29) the Government stated that none of its employees had general management and control of the actual construction of the control tower of Lucky Peak Dam in May of 1953; that the work was being done by certain contractors, who possessed such general management and control; and that no employees of the Government were employed in work on the construction of the control tower in May of 1953. Answering Interrogatory No. 19, (R. 32) the Government stated that Mr. Grahm Emore was not acting in a supervisory capacity of the work being done by the contractors' employees on the dam, but that he was engaged in inspecting certain cement operations conducted at that time. Answering Interrogatory No. 23, (R. 32)

the Government stated, in effect, that the premises were owned by the United States of America but that certain areas were allocated to the contractors in which to perform their work, and that any control and authority of those areas was subject to the terms of the contract.

On June 14 and 15, 1954, respectively, the Government filed Interrogatories and Requests for Admissions of the appellants (R 24, 25, 26), which were answered on July 8, 1954 (R 36, 37, 38, 39, 40), eight days *after* the appellants had received the Government's Answer to Interrogatories and its Response to Admissions. Answering the Government's Request for Admissions Nos. 4, 5 and 6, at that time appellants denied that the Government did not have the right to direct, supervise or control the work of deceased.

Answering the Government's Interrogatory requesting, in effect, a full statement of the wrongful acts and omissions of the Government and its employees along with the names of the employees, appellants set forth (R. 38 and 39) failure to inspect; failure to provide safety apparatuses; failure to provide rescue equipment; failure to provide rescue procedures; failure to rescue the deceased; and the failure to carry out and enforce the safety practices, in violation of the statutes of the United States of America as constituting the negligence upon which this action is based.

Appellant further stated:

"That the above careless, heedless, and negligent acts and omissions are those of Walter J. Murphy, project engineer of defendant, *in charge locally of the construction of said project;* . . . and other employees of the U. S. Army Corps of Engineers whose names plaintiff does not know, but who prepared the plans and specifications of the control tower, who directed the contractor to provide safety measures, held conferences as to safety measures, supervised, inspected and checked the safety practices on the job, took pictures of the safety practices (attended safety meetings) and made reports to the defendant and its employees as to safety practices, . . ."

On July 12, 1954, the Government moved for a Summary Judgment, based upon the pleadings, admissions, interrogatories, and certified copy of the contract filed in the case. The Court, after hearing oral argument and having before it extensive briefs of counsel, on September 20, 1954, entered a Memorandum Decision granting the Motion for Summary Judgment.

On September 21, 1954, the appellants moved to amend their Complaint.

On March 3, 1955, after hearing oral arguments and upon written briefs from counsel, the Court denied the plaintiffs' Motion to Amend the Complaint, and on March 8, 1955, Summary Judgment was entered.

SUMMARY OF APPELLEE'S POSITION

The granting of the Government's Motion for Summary Judgment was proper and the Memorandum Decision of the lower Court correctly states the applicable law to this case.

We hesitate to attempt to improve or supplement the lower Court's decision, because standing alone it meets the majority of arguments raised by appellants. We will, however, set forth as briefly as possible the Government's position as against the major contentions made by appellants in their Brief.

Under the Federal Tort Claims Act the Government has consented to be sued for torts committed by it in the same manner and to the same extent *as a private individual would be liable under the circumstances.*

That liability is to be determined by the *law of the place where the tort is committed as it would apply to a private person under the same circumstances.*

Under the allegations of the Complaint, the Government was engaged in the construction of a dam, owned the land upon which the dam was being built and actually supervised and controlled and exercised dominion over the construction work on the dam.

The deceased lost his life while engaged as an employee of the contractor operating under the supervision, dominion and control of employees of the Government.

The appellants received compensation benefits from the contractor, or its surety, for the death of

William M. Kirk under the provisions of the Idaho Workmen's Compensation Act.

Payment made to appellants under the Idaho Workmen's Compensation Act is an exclusive remedy, and all other rights and remedies on account of the death of William M. Kirk except those remedies which might accrue against a third-party tort-feasor are barred.

If the Government were a private person operating under the Idaho Workmen's Compensation law, and under the circumstances of this case, it would be classified as an employer.

An individual standing in the position of the Government would, therefore, have the defense of the payment to appellants under the Idaho Workmen's Compensation Act of compensation benefits for the death of deceased.

Such a payment would be an exclusive remedy for the appellants and would bar recovery in this case.

I

THE GOVERNMENT HAS CONSENTED TO BE SUED FOR TORTS COMMITTED BY IT IN THE SAME MANNER AND TO THE SAME EXTENT AS A PRIVATE INDIVIDUAL WOULD BE LIABLE UNDER THE SAME CIRCUMSTANCES AND UNDER THE LAW OF THE STATE WHERE THE TORT WAS COMMITTED.

28 USCA, Section 2674, provides, in part, as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . ."

28 USCA, Section 1346(b), provides, in part, as follows:

"Subject to the provisions of Chapter 171 of this Title, the District Courts, . . ., shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ., for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

II

UNDER THE FACTS AND CIRCUMSTANCES IN THIS CASE THE GOVERNMENT IF A PRIVATE INDIVIDUAL WOULD BE CLASSED AS A STATUTORY EMPLOYER UNDER THE IDAHO WORKMEN'S COMPENSATION ACT AND THE IDAHO DECISIONS INTERPRETING THAT ACT.

Section 72-203, I.C., provides as follows:

"The rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this act *shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury.*"

Section 72-811 I.C., provides as follows:

"An employer subject to the provisions of this act, shall be liable for compensation to an employee of a contractor or sub-contractor under him or who has not complied with the provisions of Section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or sub-contractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party. . . ."

Section 72-1010, I.C., provides as follows:

" 'Employer,' unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed.

If the employer is secured it includes his surety so far as applicable."

Appellants argue that since the United States of America is a sovereign power as such it is not subject to local Workmen's Compensation laws. For this reason, they say the Government cannot claim the defenses to which an employer under local law would be entitled to under the circumstances of this case.

The Government does not claim that as a sovereign power it is subject to the Idaho Workmen's Compensation laws nor does it claim that as a sovereign it would be a statutory employer under the Idaho act. Whether or not the United States of America is subject to the Workmen's Compensation laws of the State of Idaho is not the issue in this case. The real issue is framed by the wording of the Federal Tort Claims Act, itself. The test of liability of the Government is simply this: Would a private person under the same circumstances of record in this case and under the laws of Idaho be liable? Because the Government is in fact a sovereign power and actually as such is not subject to the Idaho law is not relevant to the issue here. Rather, the question is: What liability would a private person have under these circumstances and under Idaho law.

To resolve this question we must look to the Idaho statutes and decisions to determine whether or not the Government would, *if a private person*, be classed as an "employer" under the Idaho Workmen's Compensation Act. If so, then the fact that appellants

have received compensation benefits under the Act is a bar to their suit against the Government.

What tests have the Idaho courts applied to determine whether or not a person would be classed as an employer under the Idaho Workmen's Compensation Act?

In *In re Fisk*, 40 Idaho 304, 232 P. 569, the Bonner Tie Company contracted with one D to haul ties to the railroad. D employed Danielson to do the hauling. On February 4, 1919, Danielson procured the deceased to drive his team for him, under his (Danielson's) agreement with D. While so doing, Fisk met his death. Was Fisk an employee of the Bonner Tie Company within the meaning of the Workmen's Compensation Act?

The court held that he was and states, on page 308:

> "Appellant contends that the rule of independent contractor, as applied in negligence cases is applicable to cases under the Workmen's Compensation Act, and that when the workman is employed by an independent contractor, no recovery can be had against the procurer of the work. Under our statute and the rule in the Vermont case, supra, which we approve, the doctrine of independent contractor does not apply to the present case. In *McDowell* v. *Duer*, 78 Ind. App. 440, 133 N. E. 839, the Supreme Court of Indiana held that the doctrine of 'independent contractor' is peculiar to the law of negligence *and has no proper place in the law of Workmen's compensation. The compensation*

act makes it clear that every phase of the controversy is withdrawn from the operation of the common law rules. (C.S., Sec. 6214). The intent is that every industrial workman or, his independent heir, is entitled to recover compensation for injury or death occurring in the course of his employment from the industry for which he was working at the time of the accident."

Again, on page 308, the Court states in the Fisk case:

"Under our statute the proprietor of a business and his surety may be liable for injury to a workman even though he is employed by and works under the direction of an independent contractor, provided the work being done at the time of the injury *is a part of the particular business being carried on by the proprietor.* If Derthick had been operating an independent transfer business, then Fisk, or his dependent, would have had to look to Derthick for compensation. But the facts show that Derthick was not carrying on an independent business, but was engaged exclusively in hauling the appellant company's ties and matchstock to the railroad. *The work was a part of the company's business necessary to the sale of its products. Danielson was an employee of the company within the meaning of the statute, and Fisk, who took Danielson's place temporarily, stepped into his shoes and had the same status.* We conclude that Fisk was an

employee of the company within the meaning of the statute."

In *M. E. Larson, et al* vs. *Independent School District No. 11J of King Hill, Idaho, et al*, 53 Idaho 49, 22 P. 2d. 299, a school janitor's wife assisted the janitor and was killed while scrubbing floors of the school. It was held that the wife was an employee of the school district, even though she was hired by the janitor to assist him with the school district's knowledge. The Court held that even though the wife of the janitor did not receive money from the school district for her work, the janitor received a place to live in addition to his $70.00 a month salary and on page 53, the Court states:

> "Compensaton may be in other things than money."

The Court further held in the Larson case that it was not necessary to show that control over the work of the injured or deceased employee be exercised but that if the *right of control* existed that was sufficient.

In *Jones* v. *Packer John Mines Corp.*, 60 Idaho 653, 95 P. 2d. 572 the Court held that the true test of whether or not a corporation was an employer of an injured miner within the Workmen's Compensation Act was whether the corporation was *virtually the operator of the business of mining such ore for either development of the property or its own pecuniary gain.*

In the case of *Pinson* v. *Minidoka Highway District*, 61 Idaho 731, 106 P. 2d. 1020 the deceased was

engaged by the United States Bureau of Reclamation and paid by the United States of America to work to improve a road in the Minidoka Highway District, and was directed by the Reclamation Service to work for the highway district under the direction of the State Highway Engineer. The record showed that neither the United States nor any of its officers or agents had *any control of any character over the deceased while at work, or over the work being done by the Minidoka Highway District.* The deceased was injured while working on the highway and later died of those injuries. The highway district argued that the deceased was an employee of the United States of America and entitled to compensation from the United States. They contended that for this reason he was not entitled to compensation from the highway district, because it was not an employer within the meaning of the Workmen's Compensation law. The Court states on page 737 in holding the highway district liable:

> "The general test is *the right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee,* and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation."

Appellants argue that the Government cannot be statutory employer under the facts of this case and cite the case of *Moon* v. *Ervin*, 133 P. 2d 933, 64 Idaho 464. The Court held in the Moon case that the owner of property upon which he had let a contract for the construction of a home was held not to be an employer within the meaning of the Workmen's Compensation Act. Appellants correctly quote from the Moon case. However, on page 470 the Court states further:

> ". . . as stated above, respondent Schreiber was not an employer. *He had not the power of control of either Ervin or his employees.*"

Appellants argue that the case of *Gifford* v. *Nottingham*, 193 P. 2d 1054, 68 Idaho 330 is completely in point with the present discussion. In that case Nottingham had contracted with the City of Pocatello to build a sewer. Gifford was killed while working for subcontractors hired by Nottingham. The heirs of Gifford sued for his wrongful death and Nottingham defended on the grounds that he was an "employer" under the Idaho Workmen's Compensation law and that therefore a wrongful death action could not be brought against him. Respondents argued that the City of Pocatello was the actual proprietor and therefore the "employer" under Idaho law. The Court rejected this approach and held that Nottingham was an "employer" under the Idaho law and that an action against him could not be maintained. The case was reversed and dismissed with prejudice.

Appellants contend that the Nottingham decision

is completely in point with the "present discussion." They state that in Nottingham and the case at bar both the City of Pocatello and the Government occupy similar positions in that "in each instance they exercised general supervision and inspection to determine that the work was being done according to the contract." (page 26, appellants' Brief)

In *Nottingham* the respondents argued that the City of Pocatello was the "employer" under the Idaho law and that suit would lie against the contractor Nottingham as a third party tort-feasor. The Court held that this reasoning was in conflict with its decision in *Moon* v. *Ervin*, supra, where it was held that the owner of the premises was not necessarily the "employer" in that, he *exercised no control* over the contractor or his employees.

We fail to find any statement by the Court in the Nottingham case which would even imply that the City of Pocatello "exercised general supervision and control."

Not only do we fail to find such a holding in *Nottingham*, but if such were the fact then surely the Idaho Court would have given more weight to respondent's argument that the city was the "employer" under the Idaho law, especially in light of the emphasis placed by the Court in the *Moon* case on the *lack of control* exercised by the owner of the premises.

The City of Pocatello was not a party to the suit nor is any mention made in the Nottingham decision of any right of supervision and control over the work of the contractor.

Rather it seems to us that the Nottingham decision is strong argument for holding that the Government is an "employer" in the case at bar as the facts as alleged by appellants in their Complaint set forth the existence of the *power* of control and actual *exercise* of control by the Government over the construction of the dam. The Court in the Nottingham case states on page 336:

> "Under the provision of the statute quoted, the true test is, did the work being done pertain to the business, trade, or occupation of the defendant, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability."

To be classed as a statutory employer under the Idaho Workmen's Compensation Act a party may be the owner or lessee of the premises, or other person who is virtually the proprietor or operator of the business there carried on, but who by reason of his being an independent contractor or for any other reason is not the direct employer of the workman there employed. (Section 72-1010 Idaho Code) If a person owns the premises upon which the business or operation is being carried on but exercises no control and does not have the right or power to control the activities of the employees engaged in the work being done, then that person is not necessarily a statutory employer under the meaning of the Idaho Workman's Compensation Act. (*Moon* v. *Ervin*, supra; *Gifford*

v. *Nottingham*, supra.) As long as the person has the *right to control* or the *power to control the activities* of the workmen on the premises it is not necessary to show that he actually exercised control and compensation to the employee does not have to be in actual money. (*M. E. Larson, et al* v. *Independent School District No. 11J, King Hill, Idaho, et al*, supra) The business being conducted on the premises need not be operated directly for pecuniary gain but may be conducted for the development of the property upon which the business is being conducted. (*Jones* v. *Packer Johns Mines Corp.*, supra) If a person has the right to control or direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, then he may become an employer. (*Pinson* v. *Minidoka Highway District*, supra)

In *French* vs. *J. A. Terteling & Sons, Inc.*, 75 Idaho 480, 274 P. 2d 990, a case which is somewhat similar, procedurally, to the case at bar, we have the following situation: Plaintiff sued for damages caused by injuries while working as a jackhammer operator on the Palisades Dam for Jones & Tompkins, contractors. Plaintiff alleged that he was transferred by Jones & Tompkins to work for the defendant corporation. He further alleged that defendant instructed him where to work. The defendant demurred to the complaint and the Court sustained the demurrer and granted a judgment of dismissal against

the complaint, on the grounds that the complaint, itself, alleged an employer-employee relationship between plaintiff and defendant and that, therefore, the Court was without jurisdiction to hear the matter since the question of compensation for an employee's injuries was exclusively a matter within the jurisdiction of the Idaho Industrial Accident Board under the provisions of the Idaho Workmen's Compensation Act.

The plaintiff below then filed a motion to set aside the judgment of dismissal on the ground that he was not afforded the right to amend his complaint. Along with that motion he filed an amended complaint. The motion was overruled by the lower Court.

The Idaho Supreme Court affirmed the decision of the lower Court on all points.

On page 484, the Court states as follows:

> "The relationship of employer and employee being established, the rights and remedies of the employee injured in the course of his employment are exclusively provided for by the Workmen's Compensation Law. The common law action against the employer for negligence is abrogated. Jurisdiction over the employer-employee relationship is vested in the Industrial Accident Board. (Citations)"

Concerning the overruling of the motion to set aside the dismissal, the Court states, on page 485:

> "However, appellant urges that he was entitled

to amend his complaint once as a matter of course. The demurrer having been argued and submitted to the court and ruling made thereon, the provision of the statute providing for the amendment of a pleading once as a matter of course was no longer applicable. Sec. R 5-904, I.C. Amendment thereafter could only be made by leave of court. Sec. R 5-905, I.C."

Again, on page 485, the Court states concerning the amended complaint:

". . . it is open to the same objections as the original complaint. The only difference appearing is that in addition to the facts alleged in the original complaint, appellant alleges the mere conclusion that at the time of the accident he was an employee of Jones & Tompkins and was not an employee of respondent."

For other Idaho cases discussing the effect that the right to control has on the employee-employer relationship, see *Laub* vs. *Meyer, Inc.* 70 Idaho 224, 214 P. 2d 884 and *Ohm* vs. *J. R. Simplot Co.*, 70 Idaho 318, 216 P. 2d 952.

The complaint in the case at bar flatly states that the Government was engaged in constructing a dam and that the deceased was working for the contractors who were performing the work for the Government. The complaint further states that the dam, the control works, and the land on which the dam was being built were in the possession, control, dominion,

and authority of the Government. It states that Major Grahm Emore, USA, was supervising the work and that the Government was engaged through its employees in the detailed supervision of the construction of the dam.

Standing alone the complaint unequivocally sets forth facts sufficient to make the Government a statutory employer under the Idaho Workmen's Compensation Act if the Government were a private person.

In its answer to interrogatories of the plaintiff the Government states in effect that none of its employees had control over the actual construction of the control tower of Lucky Peak Dam in May of 1953; that the work was being performed by contractors having such general management and control; that no employees of the Government were working on the control tower in May of 1953; that Mr. Grahm Emore was not acting in a supervisory capacity but that he was engaged in inspecting certain cement operations being conducted by the contractors in May of 1953; and that the premises upon which the dam was being built were owned by the United States of America but that certain areas were allocated to the contractors and that they had control over those areas.

After the above answers were given the the appellants and *after* a certified copy of the contract between the Government and the contractors was handed to appellants, they denied that the Government did not have a right to direct, supervise and control

the work of the deceased. In their answer to the Government's interrogatories appellants set forth that an employee of the defendant, one Walter J. Murphy, Project Engineer, was *in charge locally of construction of the project.*

Considering the entire record, the Government, if a private person under the facts and circumstances in this case and under the Workmen's Compensation Act of the State of Idaho and the Idaho decisions interpreting that Act, would be considered an "*employer.*" Certainly the Government has the right in this case to raise the defense that the appellants are excluded from recovery because they were paid compensation benefits under the Workmen's Compensation law of the State of Idaho prior to the time of their suit against the Government and that such payment is an exclusive remedy.

III

CONGRESS MEANT BY ENACTING THE FEDERAL TORT CLAIMS ACT TO MAKE THE LAW OF THE STATE WHERE TORT WAS COMMITTED *IN ALL RESPECTS* A MODEL FOR THE LIABILITIES IT CONSENTED TO ACCEPT FOR THE GOVERNMENT.

Appellants argue that the Government by consenting to be sued under the Federal Tort Claims Act actually intended that the application of the law of the state where the tort was committed should be confined only to whether or not a tort was actually

committed and the extent of recovery allowed. On page 20 of their brief, appellants cite the case of *Capital Transit Company* vs. *United States*, 183 F. 825 at 829, as authority for their assertion that the application of the local law of the place where the tort is committed should be severely limited.

The *Capital Transit case* was reversed in *United States,* vs. *Yellow Cab Company*, 340 U. S. 543, 1951, another case cited by appellants.

Actually, in the *Capital Transit case* the question was whether the Government could be joined as a third party defendant in a suit between private litigants when the purpose of such joinder would be to secure contribution from the United States as a joint tort-feasor under the Federal Tort Claims Act. The appellate court in a strict interpretation of the Federal Tort Claims Act held that the Government could not be brought in as a third party defendant under those circumstances and that the United States could only be sued in the manner and according to the procedure to which it had consented. Since the Tort Claims Act did not permit the joinder of the United States either as a co-defendant or as a third party defendant, therefore, the Government would not be allowed by the Court to become a third party defendant in that case.

The United States Supreme Court in the *Yellow Cab case*, supra, held that the Government could be made a third party defendant under the Federal Tort Claims Act and stated, on page 554:

"Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy.' 243 N. Y. at 147, 153 N. E. at 29. 'A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizens—When authority is given, it is liberally construed.' United States vs. Shaw, 309 U.S. 495 at 501."

Appellants argue that "*the fact workmen's compensation has been paid, therefore, has no effect upon a claim under the Federal Tort Claims Act, if the local law allows it. And Idaho law does.*" Payment of benefits under the Idaho Workmen's Compensation Act is not a bar to an action for wrongful death against a third party tort-feasor or one who is not the employer of the injured person under the interpretation of the word "employer" in the Idaho Workmen's Compensation Act. Idaho law does not allow suit for wrongful death against a person who has been classed

as a statutory employer under the Idaho Workmen's Compensation Act. We submit that the Government would if a private person under the Idaho law be so classed.

Cerri vs. *United States*, 80 Fed. Supp. 831; *Mid-Central Fish Company* vs. *United States*, 12 Fed. Supp. 792, *Somerset Seafood Company* vs. *United States*, 193 Fed. 2d 631; *Claypool* vs. *United States* 98 Fed. Supp. 702, and *Union Trust Company* vs. *United States*, 113 Fed. Supp. 80, cited by appellants in their brief are all situations wherein the defense had been raised that the Governmental activities giving rise to the injuries being sued for were such that a private person would not be engaged in. The Court in those cases holds that merely because of the peculiar nature of the activity in question, for example, the marking of a battleship, disseminating of weather information, or the regulating of aircraft, it is not sufficient reason to remove the Government from liability for negligence of its employees while acting within the scope of their employment while engaged in such functions. We agree.

In the case of *Rushford vs. United States*, 204 F. 2d, 831, CCA 2, 1953, the Government was sued under the Federal Tort Claims Act by an employee of a contractor in chief to whom the Government by contract had let out a housing project, with the retained right of supervision. The Court below, in its decision, 92 F. Supp. 874. summarily dismissed the complaint and the appeal is taken from that order

of dismissal. It was held that in applying the New York law, that a release of one of several joint tort-feasors without reserving any claim against others releases all, to the fact that the plaintiff-employee gave a release to a subcontractor, whose truck had caused his injuries that his suit was properly dismissed. The Court states, on page 832:

> "The 'Federal Tort Claims Act' gives jurisdiction to the district courts over actions for injuries caused by an employee of the United States 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred', . . . On the other hand it is settled law that state (New York State), following the common law, the release of one of several joint tort-feasors, without reserving any claim against the others, releases all. The plaintiff's answer to this is that although the Act adopts the local law so far as concerns those facts that are necessary to determine whether a claim arises at all, it stops there. Transactions that may release the claim, or, we assume, may affect its continued existence in any other way, are not within the words: 'under circumstances where—a private person, would be liable'. We need not say whether the effect of a release, executed in another state, is to be determined by the law of that state, or by the law of the state where the claim arises, for the release at bar was executed in New York; and the plaintiff does

not tell us to what law we are to look; whether to some 'general' or 'Federal' law under the doctrine of Swift v. Tyson, 16 Pet. 1, 10 L Ed. 865, or elsewhere. Nor need we seek any such umbrageous refuge; *for it is plain that Congress meant to make the proper state law in all respects the model for the liabilities it consented to accept; and that the 'circumstances' included as much those facts that would release a liability once arisen, as those on which its creation depended.* Since the release was executed in New York, it is the law of that state that controls."

Under the reasoning of the liberal construction of the Federal Tort Claims Act as set forth in the *Yellow Cab case* by the Supreme Court of the United States, and especially considering the *Rushford* decision, and the wording in the Tort Claims Act itself, we do not feel that the courts have intended that the Government should be deprived of any of the defenses which would be available to a private person under the law of the state where the tort occurred and under the circumstances of that particular case.

IV

NO GENUINE ISSUE AS TO ANY MATERIAL FACT BEING PRESENT, THE GOVERNMENT WAS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

Rule 56 (b) of the Federal Rules of Civil Procedure provides, in part, as follows:

"A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

Rule 56 (c) of the Federal Rules of Civil Procedure provides, in part, as follows:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .*"

On a motion for summary judgment made by the defendants facts well pleaded in the complaint must be taken as true. Certainly where no answer has been filed, unless by admissions, depositions, or other evidence, it appears otherwise beyond genuine controversy. *10 Cyc. of Fed. Proc., 3d Ed., 193, Sec. 35.22.* In the case of *Suckow Borax Mines Consolidated, Inc., et al.* vs. *Borax Consolidated, Ltd.*, et al, CCA 9, 1950, 185 F. 2d 196 Cert. Den. 340 U.S. 943, wherein the plaintiff brought an action for treble damages for violation of the Sherman and Clayton Acts, and the Court entered an order dismissing plaintiff's complaint, the Court upheld the lower Court on the grounds that the plaintiff's cause of action was barred by the California three-year statute of limitations. One of the procedural questions

involved in this case was the question of what effect the filing of a motion of dismissal, or in the alternative, a motion for summary judgment, has on pleadings then on file. On page 205, the Court states:

> "Appellants' next contention is that appellees, by filing their motions, admitted all of the well pleaded allegations of fact in the complaint, and that the affidavits filed by appellees in support of the motion cannot be used to contradict such allegations in the complaint. Generally speaking, this is a correct statement of the law. Rule 56 was not designed to permit a trial of real and genuinely contested issues of fact by affidavit. (citation) But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no 'genuine' issue remains for the trier of the facts. (citations)."

In *Burnham Chemical Company* vs. *Borax Consolidated Company* (CCA 9) 1948, 170 F. 2d 569, the Court states, on page 574:

> "The court was fully persuaded that if the evidence then before it was taken as true, and *all reasonable inferences favorable to appellant were drawn therefrom,* this evidence would still lead a reasonable man impartially exercising his judgment, to conclude that it revealed an entire absence

of any genuine issue in the case as to any material fact . . ."

In *Harris* vs. *Railway Express Agency, Inc.*, 178 F. 2d 8, CCA 10, 1949, an action by the plaintiff against the Railway Express Agency for personal injuries, a summary judgment for the defendant was entered and that judgment was affirmed on appeal. On page 9, the Court states:

"On a motion for summary judgment, *all facts in the complaint well pleaded stand admitted.* On a consideration of such a motion, the court not only considers the allegations of the complaint but also all facts shown by depositions and affidavits, concerning which there can be no dispute."

In the case of *Creedon* vs. *Bowman*, 75 F. Supp. 265, DC WD (Penn.) 1948, the Court states, on page 267:

"Since no answer has been filed, the motion filed by the defendant could be considered either as a motion for summary judgment or to dismiss the complaint. *In either instance all facts well pleaded in the complaint must be presumed to be true.*"

On a motion for summary judgment then the Court must look to all of the pleadings, interrogatories, admissions, depositions, or affidavits on file in the case at the time the motion is made. The allegations of the complaint for purposes of determining the motion for summary judgment must be taken as true and

considered in the light of the other pleadings on file.

In applying these rules to the consideration of the motion for summary judgment made by the Government, the court correctly granted that motion for the following reason:

The complaint, interrogatories and admissions make it clear that appellants claim that the Government, through its employees working on the Lucky Peak Dam, *controlled, supervised, and exercised dominion over the actual construction of the dam and over the premises upon which the dam was being built.* A private person, under the circumstances set forth in the pleadings in this case and under the Workmen's Compensation Act of the State of Idaho, would be classified as an "employer" and that, therefore, appellants' suit for wrongful death of the deceased is barred under the exclusive provisions of the Idaho Workmen's Compensation Act.

V

THE APPELLANTS WERE NOT ENTITLED TO AMEND THEIR COMPLAINT AS A MATTER OF RIGHT AND THE COURT'S REFUSAL TO GRANT SUCH AN AMENDMENT AS A MATTER OF LAW WAS WITHIN ITS SOUND DISCRETION.

In the case of *United States, Ex Rel. Brensilber, et al,* vs. *Bausch and Lomb Optical Company, et al,* 131 F. 2d 545 (CCA 2nd) 1942, the United States sued to recover penalties under 31 USCA, Section

231. A motion for summary judgment dismissing the action was granted and the plaintiffs appealed. On page 547, the Court states:

> "In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a), Federal Rules of Civil Procedure, 28 USCA, following Section 723 (c), to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. *But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset* . . . The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud."

Rule 15 (a) of the Federal Rules of Civil Procedure provides, in part, as follows:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty days after it is served. Otherwise, a party may amend his pleading only by leave of court or by a written

consent of the adverse party; and leave shall be freely given when justice so requires . . ."

As to whether or not a motion for summary judgment is considered a responsive pleading, the decisions are in conflict. The court held that such a motion was a responsive pleading in the case of *Triangle Conduit and Cable Company, Inc.* vs. *National Electric Products Corp.*, (DC Delaware) 1941, 38 F. Supp. 533. This case was reversed on other grounds in 125 F. 2d 1008. In *Park-in Theaters* vs. *Paramount-Richard Theaters* (DC Delaware) 1949, 9 FRD 267 citing *Rogers* vs. *Girard Trust Co.*, CCA 6, 1947, 159 F. 2d, 239, the court held that a motion for summary judgment was not a responsive pleading. We favor the latter decisions.

That question is not at issue in this case, however. Before the motion to amend the complaint was made in the case at bar, the Court had *entered a memorandum decision granting the Government's motion for summary judgment.* The motion for summary judgment had been made by the Government on July 12, 1954, and the Court, after hearing oral argument and after receiving extensive briefs from both sides, handed down its memorandum decision granting that motion on September 20, 1954. Appellants did not move to amend their complaint until after the Court's decision was made.

In the case of Rucienski vs. Vanadium Corporation of America, 6 F. R. D. 313, DC WD (N.Y.)

1943, which was a suit for damages for injuries caused by a disease attributed to the inhalation of harmful impurities in the air, plaintiff's motion to file an amended complaint was granted after a motion for summary judgment was filed. Here the motion was argued before the Court and taken under advisement by the Court with the understanding that the motion would be held subject to being brought on for further consideration upon notice by either party. Neither party had made any move to bring the motion up for further consideration, and *no decision by the court on the motion had been made.* The plaintiff then moved for leave to serve an amended complaint and the defendant opposed the motion on the ground that it was not timely. On page 313, the court states:

> "The defendant opposes the motion on the ground that it is not timely. I think there is no merit to that contention. *There has been no decision on the Motion of Summary Judgment and the parties are in much the same position as if that motion had never been made.*"

Appellants possibly recognized the fact that they did not have, as a matter of right, the right to amend the complaint without leave of the Court in this case. because leave to amend was requested on September 21, 1954, after the memorandum decision of the Court granting a motion for summary judgment was entered and counsel for appellants, in his affi-

davit, recognized the fact that the memorandum decision of the Court granting the motion for summary judgment had been entered.

It has been held in the case of *In Re Watauga Steam Laundry,* DC ED Tennessee, 1947, 7 F.R.D. 657, that Rule 15 (a) was designed for the benefit of the party, and that it was a well recognized procedural principal that a party may waive rights preserved peculiarly to him. The court held that the right to amend his pleading once without leave by applying for leave to amend and causing a hearing on that application was waived.

It was within the sound discretion of the trial court to either refuse or grant the motion for leave to amend the complaint. See *Royal Indemnity Company* vs. *Olmstead,* 193 F. 2d 451, CCA 9, 1951.

The court below, in denying appellants' motion for leave to amend the complaint, states as follows:

> "On consideration of the pleadings, admissions, interrogatories and briefs on file herein, it does not appear that it would serve any useful purpose to grant plaintiff's motion nor does it appear that granting such leave would be in the interests of justice. Also, the Court is not inclined to exercise its discretionary power to grant such leave since. by amending, plaintiffs seek to shift their ground, denying facts, which they earlier alleged and admitted, on which summary judgment was granted. Plaintiffs now seek to proceed upon a theory which

conflicts with that which they pursued up to the granting of said summary judgment." (Tr. 59)

Plaintiffs, in their attempt to amend the complaint, are, in effect, attempting to reduce their allegations that the Government controlled the construction work on the dam to the point where the Government would not have enough control over the activities of that work to constitute it an employer under the Idaho Workmen's Compensation Act, and yet, on the other hand, they want to allege sufficient control so that the Government would be liable under the facts of their claim.

However, in their amendments to the complaint (Tr. 70) the appellants allege:

> "That the work upon the Lucky Peak Dam project being performed by the independent contractor, was done under said Contract No. DA-45-164 -eng-2200, and that the work thereunder *was being conducted under the general direction of the contracting officer thereon and subject to the inspection of his appointed agents, all of whom were employees of defendant. That such general supervision and inspection as set forth in said contract was for the purpose of determining compliance by the independent contractor by such contract.*"

We submit that the above allegations in the proposed amendments of supervision and control on the part of the Government under the terms of the con-

tract would classify the Government as an employer under the Idaho Workmen's Compensation Act if the Government were a private person, and that if the Court had granted appellants' leave to amend the complaint in the manner requested that the amended complaint would have been subject to a further summary judgment in favor of the Government as a matter of law.

When the defect in a complaint is basic and appears incapable of being cured, it would be a waste of time to permit a plaintiff to have a chance to correct a faulty pleading. See *Boro Hall Corp.* vs. *General Motors Corp.*, (DC SD NY), 37 F. Supp. 999, affirmed 124 F. 2d 822; *Louisiana Farmers Protective Union* vs. *Great Atlantic and Pacific Tea Co.* (DC ED Ark.) 40 F. Supp. 897. Also see *Package Closure Corp.* vs. *Sealright Co.*, 4 F.R.D. 114 (DC SD NY) 1943.

In the case of *Hale* vs. *Morgan Packing Co.*, 91 F. Supp. 11 (USDC ED Ill.) 1950, the Court held that, on page 13:

> "Of course, plaintiff could be permitted to amend his complaint and make the new party defendant, but the Court should not permit an amended pleading to cure defects therein where the amendment would be futile. *U. S.* vs. *Crary*, DC, 1 F. Supp. 406; *Hartmann* vs. *Time, Inc.*, DC 64 F. Supp. 671, at page 681."

In the case of *Bell* vs. *Morgan*, et al, 199 F. 2d 168

(CCA DC) 1952, an action wherein plaintiff sued on alleged agreements in writing for the sale of land in the District of Columbia, the lower court awarded summary judgment to the defendants and plaintiff appealed. It was held that the refusal of Court after judgment was entered to permit plaintiff to file an amendment to his complaint alleging instead of an agreement in writing an oral agreement evidenced by a memorandum in writing was an error.

CONCLUSION

In view of the arguments advanced in this brief and in light of the lower court's memorandum decision on the same questions the judgment below should be affirmed.

We should like to present to the Court very briefly in this conclusion a further equitable argument in favor of the judgment below.

The purpose of the passage by Congress of the Federal Tort Claims Act was to equalize the remedies of persons who should happen to be damaged because of the wrongful acts of governmental employees acting in the scope of their employment. The passage of the Act was to relieve some of the burden placed upon Congress caused by bills for relief of private persons so damaged who had no other remedy or recourse, because the United States of America could not be sued without its consent.

The tort claims act was passed to permit suit

against the Government under certain conditions "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The reason for this provision was to equalize the remedies available to the citizens of the same state. Because prior to the passage of the act a person injured by the negligent acts of an employee of the Government had no remedy for his damages at law. But a person injured by similar acts of negligence of an employee of a private company could sue the employer and collect damages.

Appellants contend that not only should they receive compensation under the Idaho Workmen's Compensation Act from the contractor but that they should also collect damages in addition from the Government. According to their reasoning not only has the Tort Claims Act equalized the remedy to the citizens of Idaho, but it doubles the remedy if the negligent person happens to be an employee of the United States of America.

Appellants admit they have recovered under the Idaho Workmen's Compensation law. They claim the right to further recovery against the Government. We submit that if a private person were the defendant appellants could not maintain this action and if it were allowed against the Government, the only reason would be that the defendant happens to be the United States of America.

If appellants were allowed to recover in this case and if this type of action were permitted against the Government, a situation would exist which would be just as inequitable as it was before passage of the Tort Claims Act. Because an injured person in one instance could recover compensation from his employer and be excluded from any other remedy under the Idaho Workmen's Compensation Act; but another person injured under identical circumstances could recover compensation under the Idaho law and, in addition, could recover judgment against the Government.

We submit that the type of situation presented in the case at bar was one which the Federal Tort Claims Act intended to prevent by the provision allowing recovery only "if a private person would be liable to the claimant in accordance with the laws of the place where the act or omission occurred."

Respectfully submitted,

SHERMAN F. FUREY, JR.
United States Attorney for the District of Idaho

By ....

JOHN T. HAWLEY
Assistant United States Attorney for the District of Idaho.